

**POH SIN MINING CO. v.
WELFARE INSURANCE CO. LTD.**

[O.C.J. (Chang Min Tat J.) October 1, 1970]

[Ipoh — Civil Suit No. 181 of 1967]

Workmen's Compensation — Workmen's insurance policy — Construction of — Whether insurers liable on policy — Ambiguity — Extrinsic evidence — Evidence admissible — Evidence Ordinance, 1950, s. 92(f).

Insurance — Ambiguity in policy — Identity — Admissibility of extrinsic evidence.

The defendants disclaimed liability on a workmen's insurance policy as they said it was issued not to the plaintiff company but to Lau Sook Khim and Hah Ah Sin. The proposal was signed by one Liao Kiam Leong and over his name was impressed the rubber stamp of the plaintiff company but the cover note was in the name of Lau Sook Khim and Hah Ah Sin of Poh Sin Mining Company.

Held: (1) in this case there could be no doubt as to the identity of the actual employers covered by the policy;

(2) if there was a latent ambiguity in the policy extrinsic evidence was admissible to identify the persons and things referred to in the policy and in the light of the evidence and the surrounding circumstances the insured was the plaintiff company.

Cases referred to:-

(1) *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356.

(2) *Bank of New Zealand v. Simpson* [1900] A.C. 182.

CIVIL SUIT.

Chin Fook Yen for the plaintiffs.

P. P. Dharmananda for the defendants.

Cur. Adv. Vult.

Chang Min Tat J.: The plaintiff company claimed in this action from the defendant insurance company for an indemnity on a workmen's insurance policy in the sum of \$5,400 which the plaintiff company was found liable to pay to the dependants of one of its workmen. It was agreed between the parties that the deceased was a workman of the plaintiff company within the meaning of "workman" in the Workmen's Compensation Ordinance 1952 and that he died as a result of injuries sustained by him in an accident which arose out of and in the course of the deceased's employment with the plaintiff company.

The only issue raised by the defence is whether the insurers were liable in respect of the policy which they said was issued not to the plaintiff company but to Lau Sook Khim and Hah Ah Sin.

It was also agreed that the plaintiff company was a partnership of tin-miners carrying on their operations at Pengkalan, Lahat.

Other facts are not greatly in dispute. In an undated proposal form of the usual type used by the insurers, a certain Liao Kiam Leong applied for a policy to cover workmen's compensation claims in the name of Lau Sook Khim and Hah Ah Sin. It was stated in this proposal form that the situation where the workmen were employed was the "Poh Sin Mining Company Pengkalan," which I take to mean the Poh Sin Mine at Pengkalan. Over the name of the ap-

A plicant, Liao Kiam Leong, was impressed the rubber stamp of the plaintiff company. A cover note dated 1st May, 1965, was then issued for 30 days commencing from the date of issue in the name of Lau Sook Khim and Hah Ah Sin of Poh Sin Mining Company.

B A tentative objection was taken to the admissibility of the cover note. It is of course a matter of settled law that upon the issue of the policy of insurance, the validity of the cover note disappears and it could not be used to construe the policy itself. But as it turned out, it was not necessary at all to use the cover note for this purpose. Indeed there was no discrepancy between the cover note and the policy and in view of this, counsel for the defendants did not press his objection and it was admitted for what it was worth.

C The policy that was issued in consequence on the 1st May, 1965, named the insured to be Lau Sook Khim and Hah Ah Sin, address 25 Green Lane, Ipoh and again stated the place of employment as the Poh Sin Mine in Pengkalan.

D Among the workmen insured was one assistant *kepala*. The deceased was an assistant *kepala*, and though evidence was extracted that very possibly the miners had not employed the full quota of workmen required under the Mining Enactment, there was no evidence of the employment of another assistant *kepala*.

E In evidence, Hah Ah Sin testified that he was at all material times the managing partner of the plaintiff company and that he had no other mining land at Pengkalan. The policy in question was taken on his instruction to his works manager. This manager, Liao Kiam Leong, averred that he took out a policy from the insurers to cover the workmen of plaintiff company and that the names of Lau Sook Khim and Hah Ah Sin were the names of the representatives of the plaintiff company. He admitted in cross-examination that the names of these two persons were supplied by him to the insurers' agent when the agent filled in the proposal form. This agent, who at the trial had ceased being an agent of the insurers, confirmed that he was asked for a policy for the plaintiff company. He had not seen the notice of accident submitted by the plaintiff company in the usual form used by the insurers.

F Now this notice similarly repeated that the policy-holders were Lau Sook Khim and Hah Ah Sin. It was however signed by Hah Ah Sin under the Chop Poh Sin Mining Company as employer.

G The defence elected not to call any evidence.

H With respect I do not think it necessary to refer to the lengthy and learned submission of counsel for the defence, except to say that the submission is well founded in law, but well-founded as it is, I find after due consideration, that there is a flaw, if I may so describe it and the flaw it seems to me is that it fails to give consideration to the signature of the proposer on the proposal form and it fails to touch on the matter of the proper construction of the policy.

I The fact that the proposal form was signed by Liao Kiam Leong over the chop of the plaintiff company must mean that the policy was procured or meant

to be procured for the plaintiff company *per procuracionem* Liao Kiam Leong. While I accept that in filling the proposal form, the insurance agent was agent of the proposer and not of the insurers, see *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.*⁽¹⁾ cited by counsel for the defence and while I bear in mind that the proposer was stated to be Lau Sook Khim and Hah Ah Sin, I do not think there can be any suggestion that both parties to the policy were in any doubt as to the identity of the actual employers or that there was no *consensus ad idem* between the insurers and the plaintiff company. The advice that the place of employment was the Poh Sin Mining Company at Pengkalen immediately after the proposer's name must in my view negative any suggestion of doubt now raised by the insurers.

If I am wrong, then the matter is one for construction of the policy. The plaintiff company is a partnership concerning Hah Ah Sin, Liao Kiam Leong who signed the proposal form and 4 others but not Lau Sook Khim. There is clear and uncontroverted evidence that neither Lau Sook Khim nor Hah Ah Sin had any mine operating in Pengkalen either jointly or severally and had no occasion whatsoever to employ any workman in Pengkalen. There is further the evidence of the then agent of the insurers that the insurance that was required was for the plaintiff company. In the light of these circumstances as disclosed in the evidence, there is a latent ambiguity in the policy, an ambiguity shown when the language is not *prima facie* consistent with the existing facts and there is a conflict between the plain meaning of the language used and the facts existing, and it is I think settled law that where there is a latent ambiguity, extrinsic evidence is admissible to identify the persons or things referred to in the document.

In *Bank of New Zealand v. Simpson*⁽²⁾ at page 187, there appeared this rule of evidence:

"... Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about.

The rule is thus stated in *Taylor on Evidence*, 8th ed. vol. ii, s. 1194: 'It may be laid down as a broad and distinct rule of law that *extrinsic evidence of every material fact* which will enable the court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words to *identify the persons and things* to which the instrument refers must of necessity be received.' In *Grant v. Grant* L.R. 5 C.P. 727 at p. 728, Blackburn J. quoted judicially the following passage from his valuable work on *Contract of Sale* (p. 49): 'The general rule seems to be that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected.'

This rule of evidence is of course section 92(f) of our Evidence Ordinance.

Now apart from the facts and surrounding circumstances which had been given in evidence, it is clear from the documents agreed upon and as I take it put into evidence by consent, that the sub-lessees of the mining land had given permits to mine renewed from time to time to Lau Sook Khim and Hah Ah Sin and that by an agreement between Lau Sook Khim

A of the one part and Hah Ah Sin of the other part made on a date anterior to the policy, Hah Ah Sin was to have the sole and exclusive management of the mine. The capital was to be provided by Hah Ah Sin who was to get by far the biggest portion of the net proceeds from the ore won from the land. It was also provided that Lau Sook Khim was to remain one of the permittees together with Hah Ah Sin from the sub-lessees and it is clear that it was only because of his original right in such capacity and his remaining in this capacity that Lau Sook Khim continued to draw his relative minor portion of the proceeds. The relationship between Lau Sook Khim and Hah Ah Sin thereafter was not therefore dissimilar to that between a tributee and tributor. And in my view the fact that Lau Sook Khim did not become a partner in the partnership subsequently formed by Hah Ah Sin with Liao Kiam Leong and 4 others only goes to prove that apart from a share in the proceeds derived from his being one of the 2 permittees from the sub-lessees, Lau Sook Khim had no prospects of claims under workmen's compensation or common law liability which he had need to insure against.

Again if I am wrong that the documents in the agreed bundle were in evidence, I am of the opinion that there is sufficient evidence on the record for me to hold on to the view I have taken. The fact that Lau Sook Khim was not a partner, as averred in the pleadings and not challenged, must support the view that the insured were the plaintiff company and not Lau Sook Khim and Hah Ah Sin.

I am of the opinion that this case in view of the latent ambiguity seen when the policy is set against the surrounding circumstances turns upon what is the true construction of the policy. And as a matter of construction, in the light of the evidence and the surrounding circumstances which are in my view admissible in evidence under section 92(f) of the Evidence Ordinance, I find as a fact that the insured was the plaintiff company. There will therefore be judgment for the plaintiffs in the sum claimed, interest thereon at the rate of 6% from filing the writ to payment and costs.

Judgment for the plaintiffs.

Solicitors: *Chin Fook Yen; Dharmananda & Co.*

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